2013 IL App (2d) 120190-U
No. 2-12-0190
Order filed September 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-1881
JONATHAN JORDAN,	)	Honorable Allen M. Anderson,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The *pro se* postconviction petition does not state an arguable claim that trial counsel was ineffective for failing to properly argue a motion to dismiss based on a violation of the speedy trial statute; affirmed.

¶ 2 Defendant, Jonathan Jordan, appeals from the summary dismissal of his *pro se* petition filed pursuant to the Post-Conviction Petition Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant contends that his postconviction petition raised a gist of a constitutional claim that his guilty plea was involuntary as a result of the ineffective assistance of trial counsel for failing to properly argue a motion to dismiss based on a violation of the speedy trial statute. We affirm.

¶ 3 FACTS

¶ 4 On November 16, 2010, defendant was indicted on three counts of aggravated criminal sexual abuse (No. 10-CF-1881), and two counts of failure to register as a sex offender (No. 10-CF-1882). He was initially arrested on a warrant for both cases in Mississippi on August 19, 2010. Defendant was returned to custody in Illinois on November 25, 2010. Defendant's counsel filed a speedy trial demand pursuant to section 103-5 of the Code of Criminal Procedure of 1963 (speedy-trial statute) (725 ILCS 5/103-5 (West 2010)) on December 1, 2010.

¶ 5 On December 3, 2010, the State initially elected to proceed to trial first on the failure to register as a sex offender case, and the trial court set a trial date for February 7, 2011. On December 30, 2010, defendant entered a not guilty plea. On January 28, 2011, the State *nolle prossed* the failure to register as a sex offender case. The court then set a date of April 4, 2011, for trial on the sexual abuse case.

¶ 6 On April 1, 2011, defense counsel filed a motion to dismiss based on statutory speedy trial grounds. The trial court denied the motion, stating that "the *nolle pros* is a contemplated termination of [the failure to register as a sex offender case]; that the time clock begins then to run for 160 days; [and] that the trial date previously set falls within the speedy trial obligations of the State."

¶ 7 Thereafter, on May 25, 2011, defendant entered a fully negotiated guilty plea to one count of aggravated criminal sexual abuse with a 13-year sentence with 3 years mandatory supervised release, credit for 299 days served, plus costs and fines. Defendant did not file a motion to withdraw his guilty plea.

¶ 8 On December 9, 2011, defendant filed a *pro se* postconviction petition, alleging that his guilty plea was involuntary due to the ineffective assistance of his attorney in not properly arguing

his speedy trial motion. Defendant also alleged that the indictment in the failure to register as a sex offender case was obtained through perjury because the attached documentation showed that he had registered within the prior year.

¶ 9 The trial court entered a first-stage dismissal. The court found that defendant waived any opportunity to appeal the issue of a speedy trial when he voluntarily pled guilty. Defendant timely appeals.

¶ 10 ANALYSIS

¶ 11 Defendant contends that the trial court erred in summarily dismissing his *pro se* postconviction petition, asserting that it raised a gist of a constitutional claim that defendant's guilty plea was involuntary due to the ineffective assistance of trial counsel in failing to properly argue his motion to dismiss based on speedy trial grounds. Defendant maintains that, if his trial counsel had argued the speedy trial motion on the grounds that the State's election and later dismissal of the failure to register charge was done to evade the speedy-trial clock, then the charges would have been dismissed and defendant would not have had to enter his guilty plea.

¶ 12 A trial court may summarily dismiss a *pro se* postconviction petition at the first stage pursuant to section 122-2.1(a)(2) of the Act (725 ILCS 5/122-2.1(a)(2) (West 2010)) only if the petition has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id*. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. *Id.* Fanciful factual allegations include those that are "fantastic or delusional." *Id.* at 17. Under this "low threshold," petitions filed by *pro se* defendants with little or no legal training should be given

a liberal construction and are to be reviewed "with a lenient eye, allowing borderline cases to proceed." *Id.* at 9-10, 21. The summary dismissal of a *pro se* postconviction petition is reviewed *de novo*. *Id*. at 9.

¶ 13 The trial court entered a first-stage dismissal, noting that defendant's plea of guilty waived the argument and that defendant did not claim that his guilty plea was involuntary. In fact, defendant did make this claim. Nevertheless, we may affirm the trial court's order dismissing the petition on any basis supported by the record. See *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 14 A defendant's right to the effective assistance of counsel is provided by the sixth and fourteenth amendments to the United States Constitution. *People v. Angarola*, 387 Ill. App. 3d 732, 735 (2009) (citing U.S. Const., amends. VI, XIV). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To satisfy the first prong, the defendant must show that his trial counsel's performance was deficient because the representation fell below an objective standard of reasonableness. *People v. Harris*, 206 Ill. 2d 1, 16 (2002). To meet the second prong, the defendant must demonstrate prejudice by showing that there is a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different. *Id*. "The failure of counsel to argue a speedy-trial violation cannot satisfy either prong of *Strickland* where there is no lawful basis for arguing a speedy-trial violation." *People v. Cordell*, 223 Ill. 2d 380, 385 (2006). Thus, we must first determine whether defendant's speedy-trial rights were violated before assessing whether defendant's trial counsel was ineffective. See *id*.

¶ 15 A defendant possesses both a constitutional and a statutory right to a speedy trial. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8; 725 ILCS 5/103-5(a) (West 2010). Although

these provisions address similar concerns, the rights they establish are not coextensive. *People v. Woodrum*, 223 Ill. 2d 286, 298 (2006). We observe that, in this case, defendant asserts only a violation of his statutory right to a speedy trial, and has not raised a constitutional issue. See *id*.

¶ 16 Section 103-5(a) of the speedy-trial statute provides:

> "Every person in custody in this State for an alleged offense shall be tried by the court having jurisdiction within 120 days from the date [the defendant] was taken into custody unless delay is occasioned by the defendant * * *. Delay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." 725 ILCS 5/103-5(a) (West 2010).

¶ 17 When a defendant remains in custody, the 120-day statutory period begins to run automatically and the defendant does not need to make a formal demand for a speedy trial. *People v. Castillo*, 372 Ill. App. 3d 11, 16 (2007). "[P]roof of a violation requires only that the defendant has not been tried within the period set by the statute and that the defendant has not caused or contributed to the delays." *Id*. A delay is charged to the defendant when his or her acts caused or contributed to the delay that resulted in postponing the trial. *Id*.

¶ 18 Both parties believe that section 103-5(e) applies to the facts of this case. It provides, in relevant part:

> "(e) If a person is simultaneously in custody upon more than one charge pending against him in the same county, or simultaneously demands trial upon more than one charge pending against him in the same county, he shall be tried, or adjudged guilty after waiver of trial, upon at least one such charge before expiration relative to any of such pending charges of the period prescribed by subsections (a) and (b) of this Section. Such person shall be tried

> upon all of the remaining charges thus pending within 160 days from the date on which judgment relative to the first charge thus prosecuted is rendered pursuant to the Unified Code of Corrections or, *if such trial upon such first charge is terminated without judgment and there is no subsequent trial of, or adjudication of guilt after waiver of trial of, such first charge within a reasonable time, the person shall be tried upon all of the remaining charges thus pending within 160 days from the date on which such trial is terminated*; if either such period of 160 days expires without the commencement of trial of, or adjudication of guilt after waiver of trial of, any of such remaining charges thus pending, such charge or charges shall be dismissed and barred for want of prosecution unless delay is occasioned by the defendant, by an examination for fitness ordered pursuant to Section 104-13 of this Act, by a fitness hearing, by an adjudication of unfitness for trial, by a continuance allowed pursuant to Section 114-4 of this Act after a court's determination of the defendant's physical incapacity for trial, or by an interlocutory appeal; provided, however, that if the court determines that the State has exercised without success due diligence to obtain evidence material to the case and that there are reasonable grounds to believe that such evidence may be obtained at a later day the court may continue the cause on application of the State for not more than an additional 60 days." (Emphasis added.) 725 ILCS 5/103-5(e) (West 2010).

¶ 19 Defendant contends that the State's election of, and then *nolle pros* of, the failure to register charge was not a "termination" within the meaning of section 103-5(e) and did not toll the speedy-trial clock for the aggravated sexual abuse case, and thus, the trial court should have granted defendant's motion to dismiss on speedy-trial grounds. He contends further that, "the State may have elected on the failure to register case as a means of evading the speedy trial clock in the instant

case." Defendant further claims that, while the *nolle pros* tolls the speedy-trial clock for the failure to register case, "it is not clear what effect a *nolle pros* of one charge will have on the speedy trial clock of the other charge, which has not been terminated." Because the issue is not well-settled, defendant asserts that his claim that his counsel was ineffective in not properly arguing the issue should be considered an arguable claim.

¶ 20 The State asserts that *nol-prossing* " 'terminates the case" and, "[a]s a general rule, * * * toll[s] the running of the statutory speedy-trial period.' " *People v. Kizer*, 365 Ill. App. 3d 949, 956 (2006) (citing *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 102 (2004)). The State further maintains that the record refutes any allegation that the State elected the failure to register charges as a means of evading the speedy-trial time periods.

¶ 21 In *People v. Kliner*, 185 Ill. 2d 81 (1998), a jury convicted the defendant of two counts of first-degree murder and one count of conspiracy to commit murder. *Id.* at 98. The defendant argued on appeal that the trial court erred by denying his motions to dismiss established on a speedy-trial violation. *Id.* at 113. The defendant based his argument, in part, on a delay between July 19, 1995, and January 25, 1996. *Id.* at 123. That delay occurred when the State changed its original election to bring the defendant to trial first on the murder charge, and then elected to bring the defendant to trial on unrelated armed violence charges. *Id.*

¶ *22* The supreme court rejected the defendant's argument. *Id.* It observed that, when a defendant is simultaneously in custody for more than one charge, the State is required to bring the defendant to trial on one of those charges within 120 days of arrest and must try the defendant on the remaining charge within 160 days from the rendering of judgment on the first charge. *Id.* The court concluded that, "[b]ecause the State here announced on June 5, 1995, its decision to proceed to trial first on the

armed violence charges, the State was required to bring [the] defendant to trial on those charges within 120 days given that [the] defendant was in custody on those charges. The speedy-trial period with respect to the murder case was therefore tolled from June 5, 1995, until judgment was rendered on the armed violence charges." *Id.* at 123-24. The court further rejected the defendant's argument that the State engaged in subterfuge by changing its election and deciding to proceed on the armed violence charges first. *Id.* The court rationalized:

> "We first point out that the State is not precluded from changing its election. [Citations.] If the law were to the contrary, a defendant could decide which charge should be tried first by challenging a prosecutor's legitimate reason for changing his election." *Id.*

¶ 23 In *People v. Thompson*, 2012 IL App (2d) 110396, the State charged the defendant with misdemeanor counts of domestic battery and resisting a peace officer, and an unrelated felony, for which he was taken into custody. The State initially opted to try the felony case first for speedy-trial purposes under the speedy trial statute, pursuant to section 103-5(a) of the Code. Before bringing the defendant to trial in either action, however, the State changed its election and brought the defendant to trial on the misdemeanor charges first. A jury found the defendant guilty of resisting a peace officer. The defendant appealed, contending that he was denied the effective assistance of counsel because his trial counsel did not file a motion to dismiss the charges on the basis that the State failed to bring him to trial within the speedy-trial term. *Id.* ¶ 1.

¶ 24 Pursuant to *Kliner*, we rejected the defendant's argument that the speedy-trial clock related back to the date he was taken into custody once the State changed its election and decided to bring him to trial in the misdemeanor matter first. *Id.* ¶ 16. We observed that in *Kliner* the supreme court noted that the State had a right to change its election, and once the State did so, the speedy-trial clock

in the murder case tolled. *Id.* ¶ 16. We recognized that in *Kliner* the State originally opted to bring the defendant to trial on the murder charges first, then changed its election and brought the defendant to trial on the armed violence charges first, and that the defendant's speedy-trial argument on appeal stemmed from the second trial; whereas, in *Thompson,* the defendant's appeal stemmed from the first matter to proceed to trial. *Id.* ¶ 16. We found this distinction to be unimportant:

> "To conclude otherwise would be to hold that the speedy-trial clock is *not* tolled in one case when the State changes its original election, absent subterfuge. The more logical application of *Kliner* is to hold that the speedy-trial clock is tolled in the unelected matter when the State initially elects to bring a defendant to trial first on unrelated charges, and the speedy-trial clock is also tolled if the State changes its original election, absent subterfuge." *Id.* ¶ 16.

¶ 25 Our situation is similar to *Thompson*. In this case, the State first elected on the failure to register case and later, after it *nolle prossed* that charge, set the sexual abuse case for trial. Thus, even though the State changed its position, under *Thompson*, the speedy-trial clock was tolled on the sexual abuse charge from the time the State elected first to proceed on the failure to register charge until it *nolle prossed* that charge. Defendant filed his motion to dismiss on April 1, 2011, which was the 71st day of the speedy-trial term. The speedy-trial term did not relate back to the date of defendant's date of arrest when the State changed its election, absent subterfuge.

¶ 26 Moreover, we find nothing in the record that would form the basis of an argument that the State changed elections to avoid a speedy-trial issue. In *People v. Castillo*, 372 Ill. App. 3d 11 (2007), the record was silent as to why the State did not refile the charge, but the appellate court noted that only 24 days had elapsed from the speedy-trial time period before the charge had been

nolle prossed. Id. at 18. This case is similar to *Castillo* where the *nolle pros* was entered early in the term, where just 64 days had elapsed on the speedy-trial time period, and the State then began to vigorously prosecute the sexual abuse case.

¶ 27 Defendant's argument on appeal is that counsel was ineffective for not pursuing the subterfuge issue where the state "may have" elected on the failure to register to evade speedy trial on the sexual abuse charge. This claim is speculative and does not even rise to the *Hodges* standard that it is arguable that counsel's performance was deficient. Accordingly, we reject defendant's argument.

¶ 28 CONCLUSION

¶ 29 For the reasons stated, the judgment of the circuit court of Kane County dismissing defendant's *pro se* postconviction petition is affirmed.

¶ 30 Affirmed.